

## Internal Revenue Service

Department of the Treasury  
Washington, DC 20224

Number: **201103019**

Release Date: 1/21/2011

Index Number: 851.02-00

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CC:FIP:B02

PLR-122999-10

Date:

October 14, 2010

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Dear :

This responds to the request dated May 28, 2010 submitted by your authorized representative on behalf of Fund 1, Fund 2, Fund 3, Fund 4, Fund 5, and Fund 6 (each a “Fund,” and collectively the “Funds”). The Funds request that the Internal Revenue Service rule that income and gain from the commodities-linked notes described in this letter constitute qualifying income to the Funds under section 851(b)(2) of the Internal Revenue Code of 1986, as amended (“the Code”).

**Facts:**

Fund 1, Fund 2, Fund 3, Fund 4, and Fund 5 are series of Trust 1, and Fund 6 is a series of Trust 2. Trust 1 and Trust 2 are business trusts organized under the laws of State and open-end management investment companies registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq., as amended (the “1940 Act”). Each Fund qualifies as a regulated investment company (RIC) under section 851(a) of the Code. Each Fund uses an accrual method of accounting and has an annual accounting period ending on Date 1.

The Funds intend to invest in commodities-linked notes, each having the following terms and conditions (the “Note”). The Note will be issued at its par value of

\$a. The term of the Note will be b. The Note will pay monthly coupon interest at a rate equal to c. The Note's payout will be determined by reference to Index, a total return index. Each Fund, as holder of a Note, will have the right to put the Note to the issuer on any day before Date 2 at the redemption price based on the settlement price of Index on the next business day after notification to the issuer, or the same day if such notification is made by a specified hour. If on any day the settlement price of Index falls to a level that is d% or less of the initial value, the Note will "knockout" and automatically redeem at the redemption price based on the settlement price of Index on the next business day. If the Note has not been redeemed by Date 2, the Note will mature on Date 3 and the holder will receive the redemption price based on the settlement price of Index on Date 2.

The Note's redemption price upon maturity, redemption, or knockout is determined under a formula that provides for a return of the Note's face amount plus the product of the face amount, a leverage factor, and the adjusted Index return over the applicable period (which product may be positive or negative). The Note will have a leverage factor of e. The adjusted Index return means the change in the Index during the applicable period (expressed as a portion of the starting value of Index) reduced by an interest rate factor based on f and by fees equal to g% per annum. In addition to the redemption price described above, upon maturity, redemption, or knockout, the issuer will pay any coupon interest accrued since the most recent interest payment date.

The Funds make the following representations with respect to the Note:

- (1) the issuer of the Note will receive payment in full of the purchase price of the Note from each Fund substantially contemporaneously with the delivery of the Note to such Fund;
- (2) the Funds will not be required to make any payments to the issuer in addition to the purchase price, whether as margin, settlement payment, or otherwise, during the life of the Note or at maturity;
- (3) the issuer of the Note is not subject by the terms of the Note to mark-to-market margining requirements of the Commodities Exchange Act, 7 U.S.C. 2, as amended (the "CEA"); and
- (4) the Note is not marketed as a contract of sale of a commodity for future delivery (or option on such a contract) subject to the CEA.

### **Law and Analysis:**

Section 851(b)(2) provides that a corporation shall not be considered a RIC for any taxable year unless it meets an income test. Under this test, at least 90 percent of its gross income must be qualifying income derived from certain enumerated sources. Under § 851(b)(2), a corporation's qualifying income includes –

dividends, interest, payments with respect to securities loans (as defined in section 512(a)(5)), and gains from the sale or other disposition of stock or securities (as defined in section 2(a)(36) of [the 1940 Act]) or foreign currencies, or other income (including but not limited to gains from options, futures or forward contracts) derived with respect to its business of investing in such stock, securities, or currencies . . . .

Section 2(a)(36) of the 1940 Act defines the term “security” as –

any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security (including a certificate of deposit) or on any group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a “security”, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Section 2(f)(1) of the CEA provides that the CEA is not applicable to a hybrid instrument that is predominantly a security. Section 2(f)(2) of the CEA provides that a hybrid instrument shall be considered to be predominantly a security if –

- (A) the issuer of the hybrid instrument receives payment in full of the purchase price of the hybrid instrument, substantially contemporaneously with the delivery of the hybrid instrument;
- (B) the purchaser or holder of the hybrid instrument is not required to make any payment to the issuer in addition to the purchase price paid under subparagraph (A), whether as margin, settlement payment, or otherwise, during the life of the hybrid instrument or at maturity;
- (C) the issuer of the hybrid instrument is not subject by the terms of the instrument to mark-to-market margining requirements; and
- (D) the hybrid instrument is not marketed as a contract of sale of a commodity for future delivery (or option on such a contract) subject to the CEA.

Section 2(f)(3) of the CEA provides that for purposes of section 2(f)(2)(C) of the CEA, mark-to-market margining requirements do not include the obligation of an issuer of a secured debt instrument to increase the amount of collateral held in pledge for the benefit of the purchaser of the secured debt instrument to secure the repayment obligations of the issuer under the secured debt instrument.

**Conclusion:**

Based on the facts as represented, we rule that income and gain arising from the Note constitute qualifying income to each of the Funds under section 851(b)(2) of the Code.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. In particular, no opinion is expressed with regard to whether the Funds qualify as RICs under subchapter M of the Code.

This ruling is directed only to the taxpayers who requested it, and is limited to the facts as represented by the taxpayers. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

David B. Silber  
David B. Silber  
Chief, Branch 2  
Office of Associate Chief Counsel  
(Financial Institutions and Products)